



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Charles A. Martin & Associates

File: B-223059; B-223243

Date: September 5, 1986

DIGEST

1. Protest against an evaluation preference for minority-owned firms contained in a synopsis for a small business set-aside for architect-engineer (A-E) services issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), is denied because the procuring agency has statutory authority to give preference to minority-owned or -controlled small business firms under the Small Business Act, 15 U.S.C. § 644(g) (1982).
2. Where an agency, in its report to GAO, rebuts an argument raised in the protest and the protester fails to respond to the agency's rebuttal in its comments on the agency report, the argument is deemed abandoned.

DECISION

Charles A. Martin & Associates (Martin) protests against an evaluation preference for minority-owned firms appearing in two synopses advertised in the Commerce Business Daily (CBD) for award of contracts for architect-engineer (A-E) services for Tinker Air Force Base, Oklahoma (Air Force). Martin contends that there is no legal basis for these evaluation preferences.

We deny the protests.

The solicitations were issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which prescribes procedures for acquiring A-E services. Under these procedures, an agency must first publicly announce its requirements and the evaluation criteria. An evaluation board set up by the agency then evaluates under the stated criteria the A-E performance data and statements of qualifications of firms already on file, as well as data submitted by firms in response to the specific project. Discussions then must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach" for providing the services requested. The board then prepares a report for the selection official, ranking in order of preference no fewer than the three firms considered most qualified. The selection official makes the final choice of the three most qualified firms and negotiations are

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conducted with the highest ranked firm. If the contracting officer is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

One procurement calls for A-E services necessary for the alteration of electrical and mechanical building systems and interiors of three buildings at Tinker Air Force Base and was synopsisized in the April 28, 1986, CPD, issue No. PSA-9077. The synopsis stated that the procurement was a "100% small business set-aside." This synopsis also contained a minority evaluation preference which stated that "qualified minority-owned firms will be assigned additional points of consideration for selection."

The second procurement calls for multi-discipline A-E design services for maintenance, repair, alteration and new construction projects at Tinker Air Force Base and was synopsisized in the May 16, 1986, CPD, issue No. PSA-9091, page 6. The synopsis stated that the selection of an A-E firm would be based upon six listed criteria and, as one criterion, noted that "qualified minority-owned firms will be assigned additional points for consideration for selection."^{1/}

Martin argues that the selection preference for minority-owned firms violates the Brooks Act, 40 U.S.C. § 542 (1982), which requires that the award of A-E contracts be based upon "demonstrated competence and qualification for the type of professional services required."

The Air Force states that it has adopted a goal of awarding 15 percent of its A-E contracts to minority businesses (i.e., those owned or controlled by socially or economically disadvantaged persons). This goal, according to the Air Force, was established because of the congressional mandate in the Small Business Act, 15 U.S.C. § 644(q) (1982), that directs federal agencies to establish goals for participation of minority-owned small businesses in procurements with a value of \$10,000 or more. The Air Force states that "as a vehicle for achieving the congressionally mandated goal," Air Force Federal Acquisition Regulation Supplement (AFAR) § 36.602-1(a)(6) (1984), directs that additional points shall be assigned to small disadvantaged businesses in the point system used to evaluate potential contractors for A-E contracts.

The Small Business Act, at 15 U.S.C. § 644(g), states:

"The head of each Federal agency shall, after consultation with the [Small Business] Administration, establish goals for the

^{1/} Although the synopsis did not restrict the procurement solely to small business, the Air Force reports that the preference is applicable only to small business minority-owned firms.

participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency having values of \$10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Procurement Policy for final determination."

In addition to the policy in 15 U.S.C. § 644(q), encouraging the participation of small business and small business concerns owned and controlled by socially and economically disadvantaged individuals, 15 U.S.C. § 644(i) expressly permits exclusive small business set-asides for procurements of A-E services.

The Air Force argues that its policy of giving a preference to minority-owned or -controlled small business firms does not violate the requirement of the Brooks Act that A-E contracts be awarded to firms with "demonstrated competence and qualification" because the amount of points typically given to experience and capability outweigh the minority preference points by a factor of 3. The Air Force also contends that since A-E procurements may properly be set-aside for small business under 15 U.S.C. § 644(i), it is therefore no less proper for the Air Force to not only set-aside specific procurements for small business, but also to incorporate a small business minority preference in order to help satisfy its goal established pursuant to 15 U.S.C. § 644(q). Finally, citing our decision in Agency for International Development, Developing Countries Information Research Services (AID)—Reconsideration, B-218622.2; B-218622.3, Sept. 25, 1985, 85-2 C.P.D. ¶ 336, the Air Force suggests that GAO should grant considerable deference to the Air Force's interpretation and implementation of the statutes encouraging small disadvantaged business participation in procurements which the Air Force is charged with administering.

While we have questioned the propriety of restricting awards to minority firms in the absence of specific statutory authority for the action, see Image 7, Inc., B-195967, Jan. 2, 1980, 80-1 C.P.D. ¶ 6, we have not objected to the establishment of an evaluation preference, that is, the assignment of additional points to a firm based on its small business minority status, in order to implement the statutory policy of encouraging the participation of such firms in government contracting. See Leon Whitney, Certified Public Accountant, B-190792, Dec. 19, 1978, 78-2 C.P.D. ¶ 420. Here, in order to meet goals for participation by small business concerns, including those owned or controlled by socially

and economically disadvantaged individuals, the Air Force has, by regulation, provided that, "additional points shall be assigned to potential contractors that are 8(a) or small disadvantaged businesses." Air Force Regulation § 36.602-1 (1986). The regulation is a reasonable implementation of the statutes encouraging small disadvantaged business participation in procurements which the Air Force conducts. Further, we have accepted the basic principle of granting deference to the agency's interpretation of statutes which the agency is charged with administering. AID—Reconsideration, B-218622.2; B-218622.3, supra. Under these circumstances, we cannot conclude that the Air Force acted improperly by giving additional points to minority-owned or -controlled firms under these procurements for A-E services.

Martin asserts that the evaluation preference for minority firms has resulted in a disproportionate number of awards to minority firms in Northern California. In this regard, Martin points out that since April 1984, seven out of eight Department of Defense electrical engineering projects in Northern California, in which Martin competed, were awarded to small minority-owned firms.

As indicated above, we find that the evaluation preference for small minority-owned firms is not legally objectionable. The fact that a higher proportion of awards have been made to small minority firms in Northern California does not alter our conclusion since these awards are the result of the implementation of a legitimate government goal to increase awards to small business minority firms. The Air Force also explains that one of the reasons so many awards have been made to small minority-owned firms in Northern California is simply that there are a large number of these firms located in that area. There is no indication that the minority firm evaluation preference is being administered unfairly by the Air Force.

Finally, we note that Martin raised additional arguments in its initial protest letter (for example, that the minority preference violates the United States Constitution), but failed to comment on the Air Force's rebuttal of these contentions. We therefore consider Martin to have abandoned these arguments. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ 218.

We deny the protests.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel